

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Texas Cable Partners, L.P.)	
)	CSR 5676-E
Petition for Determination of Effective)	
Competition in Corpus Christi, Texas (TX0205))	

MEMORANDUM OPINION AND ORDER

Adopted: March 5, 2002

Released: March 7, 2002

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Texas Cable Partners, L.P. ("TCP") has filed with the Commission a petition¹ pursuant to Sections 76.7, 76.905(b)(4) and 76.907 of the Commission's rules for revocation of the certification of the City of Corpus Christi, Texas to regulate basic cable service rates due to the presence of effective competition. Time Warner alleges that its cable system serving Corpus Christi is subject to effective competition pursuant to Section 623(a)(2) of the Communications Act of 1934, as amended ("Communications Act"),² and the Commission's implementing rules,³ and is therefore exempt from cable rate regulation. Time Warner claims the presence of effective competition in Corpus Christi stems from the competing services provided by ClearSource, Inc. ("ClearSource"), a franchised cable operator that also provides local exchange carrier ("LEC") service in Corpus Christi. The City of Corpus Christi filed an Opposition to the petition, and TCP filed a Reply. Corpus Christi also filed Supplemental Comments in Opposition, and TCP filed a reply to the supplemental comments.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 76.905 of the Commission's rules.⁵ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁶ Section

¹See Public Notice, Cable Services Bureau Registrations; Special Relief and Show Cause Petitions, Report No. 1305, dated April 18, 2001.

²47 U.S.C. § 543(a)(2).

³47 C.F.R. § 76.905(b)(4).

⁴47 C.F.R. § 76.906.

⁵47 C.F.R. § 76.905.

⁶See 47 C.F.R. §§ 76.906 & 907.

623(l)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if a LEC or its affiliate offers comparable video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator.⁷

3. The Commission has stated that an incumbent cable operator could satisfy the “LEC” effective competition test by showing that the LEC is technically and actually able to provide services that substantially overlap the incumbent operator’s service in the franchise area.⁸ The incumbent also must show that the LEC intends to build-out its cable system within a reasonable period of time if it has not already done so, that no regulatory, technical or other impediments to household service exist, that the LEC is marketing its services so that potential customers are aware that the LEC’s services may be purchased, that the LEC has actually begun to provide services, the extent of such services, the ease with which service may be expanded and the expected date for completion of construction in the franchise area.⁹

II. DISCUSSION

4. TCP operates a cable television system in Corpus Christi for which it seeks a determination of effective competition. TCP’s cable system passes 98% of the approximately 96,119 Corpus Christi households and qualifies as the incumbent cable operator within Corpus Christi for purposes of the “LEC” effective competition test.¹⁰ TCP provided information showing that ClearSource is certified by the State of Texas as a local exchange carrier authorized to provide telephone exchange and other telephone services within Corpus Christi.¹¹ Therefore, ClearSource qualifies as a “LEC” for purposes of the “LEC effective competition” test.¹²

5. In addition to qualifying as a LEC, ClearSource was awarded a 15-year local unrestricted franchise for the provision of cable service within Corpus Christi on November 9, 1999. TCP submitted evidence that the completed portion of ClearSource’s Corpus Christi cable system passes approximately 20% of the Corpus Christi households.¹³ ClearSource has also distributed marketing materials targeted to Corpus Christi residents informing them that they need only call ClearSource for installation of its cable services.¹⁴

6. ClearSource’s marketing materials show that its cable service offers over 70 channels of video programming that includes non-broadcast programming services such as ESPN, HBO CNN, as well as a complement of local television broadcast stations, such as KRIS(TV) (NBC), KIII(TV) (ABC), and

⁷Communications Act, § 623(1)(1)(D), 47 U.S.C. § 543(1)(1)(D); *see also* 47 C.F.R. § 76.905(b)(4). This fourth statutory effective competition test within Section 632(l) may be referred to as the “LEC” effective competition test.

⁸*See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) (“*Cable Reform Order*”).

⁹*Id.*

¹⁰TCP Petition at 4-5.

¹¹*Id.* at 2-3 & Exhibits A & B.

¹²*See* 47 U.S.C. § 543(1)(1)(D); 47 U.S.C § 153(a)(1).

¹³TCP Reply to Supplemental Comments at 2.

¹⁴TCP Petition at 4-5, 6-7 and Exhibit A (consisting of direct marketing letters, customer bill inserts, web site materials and channel line-ups from various periodicals.)

KZTV(TV) (CBS).¹⁵ This complement of programming services compares closely with the programming available on Time Warner's system.¹⁶ Therefore, ClearSource provides comparable programming as required by the "LEC" effective competition test. Time Warner's petition also provides substantial evidence that there are no regulatory, technical or other impediments to ClearSource's provision of cable service within that portion of Corpus Christi passed by its completed cable system, and that ClearSource is able to provide cable service that overlaps a portion of TCP's service.¹⁷ Although its completed cable system passes only 20% of Corpus Christi households, ClearSource has published information proclaiming that it is a "well managed, well funded company backed by some of the nation's leading high-tech companies" and proposes to spend nearly \$60 million to build out its network.¹⁸ Prior to ClearSource's initiation of service TCP expanded its service to 65 channels from 52 channels.¹⁹ Effective May 2001, TCP reduced the expanded basic service monthly rate from \$20.47 to \$20.02 throughout Corpus Christi including areas not served by ClearSource.²⁰ TCP stated that as of May 14, 2001 approximately 1,000 of its subscribers had left its service for the stated purpose of taking service from ClearSource.²¹

7. The City of Corpus Christi opposes grant of this petition, arguing that TCP has failed to meet its burden of rebutting the presumption against the existence of effective competition. More particularly, Corpus Christi contends that the LEC effective competition test has not been satisfied. Corpus Christi argues that the LEC test was developed to apply to circumstances where an incumbent local exchange carriers with significant size and economies of scale would offer cable services within their own market.²² Corpus Christi asserts that ClearSource has none of these capabilities or attributes and stands in no better position of introducing effective competition than any other new cable entrant. Corpus Christi also argues that the Commission must exercise discretion in applying the LEC test and consider the likelihood and extent of impending competition.

8. Corpus Christi does not contest that ClearSource has commenced providing more than 70 channels of video programming as described above. Instead, Corpus Christi notes that ClearSource's system presently passes only 20% of Corpus Christi households, and argues that ClearSource is not physically able to deliver service to potential subscribers in the other parts of the city "with the addition of no or only minimal additional investment," as required by Section 76.906(e)(1) of the rules.²³ Corpus Christi also argues that TCP failed to establish that ClearSource plans to build-out its cable system within a reasonable time, contending that ClearSource still has five and a half years of the six and a half years specified in its franchise for build-out throughout the city.²⁴ Corpus Christi emphasizes that ClearSource has completed

¹⁵Petition at 7-8 and Exhibits A.

¹⁶*Id.* at 8 and Exhibit F.

¹⁷*Id.* at 4-6 and Exhibit A.

¹⁸TCP Reply to Supplemental Comments at 2, n. 4 and Exhibit A.

¹⁹TCP Reply at 5-6.

²⁰*Id.*

²¹*Id.*

²²Corpus Christi Opposition at 3, citing *Cable Reform Order*, 14 FCC Rcd at 5302 (1999). (The Congress expected LECs to be "robust competitors of cable operators because of their financial and technical ability and ... ubiquitous presence in the market.")

²³47 C.F.R. § 76.906(e)(1).

²⁴Corpus Christi subsequently retreated from its initial position describing that time frame as unreasonable, but none-the-less insisted that the time frame's end is too remote to induce ClearSource behavior that reflects the existence of
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only 18% of its planned cable system and has no facilities in other areas of the city from which it could deliver service, and that it would take considerable investment to provide service in such areas of the city.²⁵ Corpus Christi argues that the Commission has determined that the LEC test was not intended by the Congress to be applied so broadly that the rate protection regulations would be “lost to consumers without prospect of competition.”²⁶ Corpus Christi expresses concern that TCP will be able to reduce rates where ClearSource competition actually exists while maintaining higher rates where competition does not exist.

9. In *Time Warner Entertainment - Advance/Newhouse Partnership and Paragon Communications*,²⁷ the LEC test was found to be satisfied in Pinellas County, Florida, where, among other things, the LEC affiliate, GTE Media, had completed construction of 15% of its franchise area and was required by its franchise to complete construction within three years. In *Time Warner Entertainment Co. L.P. d/b/a Time Warner Cable*,²⁸ the LEC test was found to be satisfied in Columbus, Ohio, where the LEC affiliate, Ameritech New Media, had completed construction of 33% of its franchise area and was required by its franchise to complete construction within three years. Although ClearSource is not an incumbent local exchange carrier, the LEC effective competition test is not restricted to incumbent local exchange carriers.²⁹ In addition, ClearSource’s marketing materials proclaimed the availability of considerable resources for build-out of its franchise area within the remaining time allowed in its franchise.³⁰ Corpus Christi provided no evidence in contradiction of these representations. Indeed, Corpus Christi presumably found ClearSource sufficiently sound financially for grant of a city cable franchise. We believe the present record supports a finding that the LEC test has been satisfied. The record shows that ClearSource is technically and actually able to provide services that substantially overlaps TCP’s service area;³¹ that ClearSource intends to build-out its cable system within a time frame that does not substantially exceed time frames found reasonable in other instances; that no regulatory, technical or other impediments to household service exist; that ClearSource is marketing its services so that potential customers are aware that its services may be purchased; that ClearSource has actually begun to provide services; and that some 1000 TCP subscribers have cancelled its service for the stated purpose of taking ClearSource’s service.³²

10. Finally, we address Corpus Christi’s concern that TCP will be able to reduce rates where ClearSource competition actually exists while maintaining higher rates where competition does not exist. The Communications Act expressly permits cable operators that are determined to be subject to effective competition to maintain non-uniform rates.³³ Moreover, the record provides no basis for speculating that TCP will establish and maintain a two tiered rate structure within its franchise area, as Corpus Christi

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effective competition. *Compare* Opposition at 3-6 with Supplemental Comments at 2.

²⁵ *Id.*

²⁶ Corpus Christi Opposition at 6-7, citing *Cable Reform Order*, 14 FCC Rcd at 5304-05.

²⁷ 12 FCC Rcd 3143 (CSB 1997).

²⁸ 11 FCC Rcd 1872 (CSB 1997).

²⁹ See *Kansas City Cable Partners*, 16 FCC Rcd 18751 (CSB 2001).

³⁰ Reply to Supplemental Comments at n. 4.

³¹ A map of ClearSource’s Corpus Christi service area shows the completed portion of its system to be directly overlapping a large portion TCP’s service area. See TCP Petition at Exhibit E.

³² *Id.* at 4-8 and Exhibit A.

³³ See 47 U.S.C § 623(d).

suggests. Congress intended that the Commission have “discretion to consider the likelihood and extent of impending competition when considering whether effective competition exists under the LEC test.”³⁴ In exercising that discretion in this case, we give considerable weight to the impact of ClearSource’s services on TCP’s services demonstrated on this record. Not only has ClearSource gained subscribers from TCP, its competitive entry has restrained cable rates and stimulated service quality in the form of reduced rates across TCP’s service area and an increase in channels offered in TCP’s expanded basic service.³⁵ On balance, we believe substantial evidence of record supports a finding that the LEC effective competition test has been met in this case.

III. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that the captioned petition for a determination of effective competition filed by Texas Cable Partners, L.P. **IS GRANTED**.

12. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service in Corpus Christi, Texas, **IS HEREBY REVOKED**.

13. This action is taken pursuant to authority delegated under Section 0.321 of the Commission’s rules.³⁶

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Service Bureau

³⁴ *Cable Reform Order* 14 FCC Rcd at 5304.

³⁵ *See id.* at 5303. “Once the LEC’s competitive presence is sufficient to achieve these goals, even if the LEC’s [build-out] is not complete, the intent of the effective competition test has been met.” *Id.* at 5304.

³⁶ 47 C.F.R. §0.321.